No. 97-174

In The

Supreme Court of the United States

October Term, 1997

CASS COUNTY, MINNESOTA, et al.,

Petitioners,

v.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF OF THE CONFEDERATED TRIBES AND BANDS OF THE YAKAMA INDIAN NATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

The Confederated Tribes and Bands of the Yakama Indian Nation (hereafter "Yakama" or "Yakama Nation") is a Federally recognized Indian Tribe, pursuant to its Treaty with the United States of America, June 9, 1855 (Treaty with the Yakamas 12 Stat. 951). The Yakama Nation has 9,004 enrolled members, approximately one-half of whom reside on the 1.3 million acre Yakama Reservation in Central Washington State.[2]

The Yakama Nation, through a land purchase program, has been steadily re-acquiring Reservation fee lands when they become available for purchase. As set forth in Footnote One, additional lands have been acquired since this Court's decision in *County of Yakima v.*

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] "The Yakima Indian Reservation, which was established by treaty in 1855, (see Treaty with Yakima Nation, 12 Stat. 951) covers approximately 1.3 million acres in southeastern Washington State. Eighty percent of the reservation's land is held by the United States in trust for the benefit of the Tribe or its individual members; 20 percent is owned in fee by Indians and non-Indians as a result of patents distributed during the allotment era. See *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 415, 106 L.Ed.2d 343, 109 S.Ct. 2994 (1989) (plurality opinion). Some of this fee land is owned by the Yakima Indian Nation itself." *County of Yakima v. Yakama Nation*, 502 U.S. 251, 256 (1992). Tribal Government and Tribal member owned fee land represents approximately 50% of the fee lands on the Reservation.

Yakama Nation, 502 U.S. 251 (1992), but the most significant purchases of fee acreage occurred prior to that decision. As this Court noted in that opinion, some of this land is owned by the Yakama Indian Nation as a government. Over time this percentage is increasing, as Yakama buys fee interests from tribal and non-tribal members alike. The Yakama Nation has a specific interest in consolidating its Reservation land base for the benefit of its members yet unborn to insure the continued vitality of the Tribe and its resources.

The primary interests of the Yakama Nation in this proceeding are to rebut the "tax disaster" scenario set forth by the Petitioner's *amici* National Association of Counties by: One, demonstrating to this Court by the facts established in the remand in *County of Yakima, supra*, that Yakima County's inability to tax the fee parcels there in question, had a *de minimis* impact on the County budget, and, two, to reassure this Court that a ruling upholding the decision below will not result in an unjustified tax windfall for Tribal governments.

STATEMENT OF THE CASE

Yakama accepts the Statement of the Case as set forth in the Brief for the Respondent Leech Lake Band of Chippewa Indians.

SUMMARY OF ARGUMENT

On remand of this Court's ruling in *County of Yakima, supra*, the County determined that there were 577 parcels of fee land owned by the Tribe and its members which were subject to County *Ad Valorem* taxes.[3] Six tax years, 1989 through 1994, were in dispute in that remand. The primary remand issue ultimately was whether the County could recover on past due taxes for those years. During those years the Yakima County budgets were in the neighborhood of 70 million dollars per year.[4] For the six-year period in question the entire tax bill for tribal lands was $1,307,986.00 (see memo from Yakima County Treasurer dated April 1, 1994, attached hereto as Appendix 1), representing less than .035% of the County budget for the years in question. Not even the most tenacious "budget-hawk" can claim that such a minuscule amount can in any way harm the overall services provided by the County, particularly not in the manner alleged by *amici* National Association of Counties.

The rulings of this Court in such cases, such as *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) (to which case the Yakama Nation was also a party), *Rice v. Rehner*, 463 U.S. 713 (1983), *Oklahoma Tax Commission v. Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), together with Federal legislation such as

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[3] Due to the complexities of title records, it is uncertain that this is the correct number of parcels. The Yakama Nation believes it may be in excess of 700 different parcels.

[4] Telephonic communication with the Yakima County Auditor by this writer's legal assistant on January 7, 1998.

the National Indian Gaming Regulatory Act, 25 U.S.C. 2701, *et seq.*, mitigate the "unfair economic advantage" arguments made by *amici* National Association of Counties in the latter portions of its brief.

While Yakama and the Respondent Leech Lake Band believe these economic based arguments are irrelevant to the legal issue here before the Court, both believe it is important for the Court to be assured that, by affirming the Court below, it is not creating the scenario claimed by the Petitioner and its *amici*.

ARGUMENT

I. THE FACTS DEVELOPED IN THE REMAND OF *COUNTY OF YAKIMA V. YAKAMA NATION* REFLECT THAT THE LOSS OF TAX REVENUES FROM TRIBAL FEE LANDS HAS A *DE MINIMIS* IMPACT ON COUNTY BUDGETS.

Petitioner and its numerous *amici* hypothesize all manner of dire consequences for County revenues should this Court uphold the decision below. Those hypotheses are based upon pure speculation and the worst possible "list of horribles" that could be imagined, and assumption of large, untaxed Tribal development.

The only case that has dealt with the specifics of an entire Reservation-wide analysis of County tax revenue from *Ad Valorem* taxation of tribal fee parcels occurred in the remand of the *County of Yakima, supra,* case. The facts developed there indicate a non-existent impact on the overall County budgets involved. As shown in Appendix 1, Yakima County's records reflect 577 parcels of tribal

and tribal member owned fee lands on the Yakama Reservation. The total tax bill for these 577 parcels, for the six tax years 1989-1994[5] was $1,307,986.54. Simply dividing by those six years results in a yearly tax revenue of $217,997 for the entire 577 parcels. During that six-year period, the average Yakima County operational budget was $67,775,384.[6] Simple math then indicates that taxation of 577 parcels – here the Court deals with seven parcels at Leech Lake – on the Yakama Reservation represented only .035% of the entire County budget for the years in question. Of course, as this Court recognized at Page 256 of the *County of Yakima* opinion, *supra,* (cited at Footnote 1 herein), only a portion of those 577 parcels were owned by the Tribal Government, thereby further minimizing any impact on County revenue should the Court uphold the decision below.

As the simple analysis above indicates, in the one case that has actually dealt with the issue, the loss to County revenues through non-taxability of Tribal Government owned fee lands is *de minimis* at best. Petitioner and its *amici's* arguments, based solely on their speculation, rather than hard facts such as those reflected above,

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[5] Even though the *County of Yakima* litigation was commenced in 1988, taxes for that year were not included in the Appendix 1 calculations, as those taxes were not specifically at issue on the remand.

[6] These figures were obtained by telephonic conference with the Yakima County Auditor's Office. The figure used is the average budget. The yearly budgets are as follows: 1989 – $59,398,186; 1990 – $54,493,208; 1991 – $63,468,728; 1992 – $74,979,149; 1993 – $77,842,475; 1994 – $81,468,960.

are at the very least suspect, and should be so viewed by this Court.

II. UPHOLDING THE DECISION BELOW WILL NOT BESTOW AN UNJUSTIFIED TAX ADVANTAGE ON TRIBAL GOVERNMENTS, OR NON-INDIAN CITIZENS DOING BUSINESS WITH THEM, TO THE DETRIMENT OF COUNTIES OR THEIR CITIZENS.

A. Primary Income Generating Assets of Tribes Are Generally Held in Trust Status.

Petitioner and its *amici* assert that without a "bright line" for taxability of Tribal government lands, that those governments may create significant developments on fee lands free from County taxation. They argue that such a situation both denies the County its property taxes, and allows Tribes to have an unfair competitive advantage over the Counties' citizens. In the same breath, however, they admit that the most significant recent Tribal economic development has been in the arena of Tribal gaming (National Association of Counties Brief, P. 21), which is already Federally regulated, and in every instance known to this writer, conducted on lands held in trust, thereby preventing County *Ad Valorem* taxation in any event. Further, the Gaming Act, 25 U.S.C. 2710(d)(4), specifically exempts Tribal Gaming from State taxation. It is simply unrealistic to assume that Tribal governments, or the Federal government will alter this scenario in the future. Certainly affirmance of this decision poses no threat to County economics in the gaming arena.

Further, in the case of casino development, States and Counties are afforded some degree of protection under

the Tribal-State compacting provision of 25 U.S.C. 2710(d)(3)(C)(iii). That provision allows for the negotiation of cost sharing that could be used to defray the Counties' loss of tax revenue. Obviously that provision is not mandatory, but is certainly one that gives Counties and States some degree of leverage in the casino arena. As is noted *infra* in Section IIC, Petitioner and *amici* can point to no other actual significant Tribal development on fee land that would impact Counties.

B. Off-Reservation Development of Fee Lands Poses No Threat to Counties' Tax Base.

Again, the principal area of off-reservation development, in recent years, has been in the casino arena. Under the Federal Gaming Act, no casino can be developed unless it is located on "Indian Land," which is defined in the Gaming Act as either land within a reservation, or land that is held in trust or restricted status. 25 U.S.C. 2703(4). Accordingly, any development off reservation for gaming purposes would require a 25 U.S.C. 465 trust conversion, a process which appears to satisfy the Petitioner and its *amici* (National Association of Counties Brief, Pgs. 21-23).[7]

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[7] The National Association of Counties, at Pages 22 and 23 of their Brief, and in Footnote 20, cite various scenarios from newspaper clippings in an effort to make its point. Those citations, of course, give the reader no information as to where those lands are located – on or off reservation – or whether the proposed uses would require 25 U.S.C. 465 fee to trust conversions prior to having any potential impact on a County's tax base.

As to other off-reservation uses to which Tribal governmental property could be put, decisions of this Court at least point the way for Counties to proceed.

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1972), this Court dealt with the issue of State taxation of off-reservation activities by a Tribal government. Obviously, *Mescalero, supra*, did not deal with every possible issue that could arise, but should provide relatively clear direction. First and foremost, *Mescalero, supra*, makes clear that, contrary to the Counties' arguments, Tribes cannot proceed with off-reservation businesses with impunity. In *Mescalero, supra*, this Court found that even though the land in question was held in trust or restricted status, the Tribe was still subject to New Mexico's gross receipts tax. *Mescalero, supra* at 157.

Petitioner and its *amici's* scenario – that the Tribe could have off-reservation lands in fee and still proceed on some tax-free basis – simply does not square with the ruling in *Mescalero*. Under *Mescalero*, there was action taken under 25 U.S.C. 465 which protected the off-reservation Trial land from *Ad Valorem* taxation. While the *Mescalero* opinion does not address the issue, if the land there had been held by the Tribe in fee simple status, it would have been problematic for the Tribe to claim a tax exemption.[8] The situation described by the Petitioner and

[8] It is also almost inconceivable that a Tribal government would commit a sizeable investment outside its reservation without ensuring that the status of the site to be developed would be tax free under the statutory remedies available to it under § 465. To do otherwise simply invites further challenge by non-Tribal governments, with the resultant controversy and potential business disruption. Use of the § 465 option satisfies the counties interests. See FN. 7.

its *amici* is highly unlikely at best, and any tax exemption for off-reservation fee land is extremely problematic for the Tribal government involved.

C. On-Reservation Fee Land Development of the Magnitude Contemplated by Petitioner is Unlikely.

As noted previously, most Tribes' largest economic developments are presently tied to casinos and their resultant development. In that instance, the Gaming Act specifically exempts Tribal on-reservation gaming from State taxes. 25 U.S.C. 2710(d)(4). Accordingly, the largest and most lucrative Tribal developments are already protected from State and County taxation by specific Federal action.

Here again, Petitioner and its *amici* deal solely in speculation as to what might occur if some small number of Tribal government owned fee lands were not subjected to County property taxes. It is certainly more proper to look at this issue from the standpoint of what has occurred regarding Tribal fee land development prior to the decision in *Yakima County, supra*, than the Petitioner's standpoint of what might happen if the decision below is upheld.

Neither Petitioner nor its *amici* point to one specific instance of substantial fee land development by an Indian government prior to this Court's *County of Yakima* opinion, in spite of the fact that many States and Counties did

not impose *Ad Valorem* taxes on such properties prior to that decision.[9]

Petitioner and its *amici* point to no case of substantial Tribal development on any Tribally owned fee lands. They point to no situation that comes close to those that they now urge are certain to occur if the decision below is affirmed. There is simply no showing that affirmance will lead to unfettered Tribal development on fee lands. From a purely practical standpoint, it is likely to assure that Tribal governments, as well as anyone who might be financing them, would be reluctant to commit large sums to develop fee land even if there is an affirmance. As this case reflects, non-Indian society is relentless in its efforts to stifle Tribal development. Should this be an affirmance here, as there should be, this write doubts that the majority society will let that ruling rest. Under those circumstances, it is doubtful that Tribes will commit to develop fee lands, even if they so desired.[10]

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[9] As the record in *Yakima County, supra*, reflects, at least the States of Idaho, Oregon and Arizona did not assess *Ad Valorem* taxes against Tribally owned fee lands. This writer also understands from a discussion with counsel for Respondents that Cass County was assessing no taxes on these parcels prior to the *Yakima County* case.

[10] This, of course, presupposes that Tribal governments follow the same philosophy of land development and exploitation sought by non-Indians. As the vast majority of Reservations retain their rural and undeveloped character, it would seem clear to the Court that Tribes have a different view of the land than that of the White majority. Retaining the land base is of utmost importance to Tribes. Developing it simply because it can be developed is not. Perhaps that is why *amici* for Petitioner cannot identify a case that fits their speculative list of horribles.

Further, this Court's decisions in *Washington, supra, Rice, supra,* and *Oklahoma Tax Commission, supra,* placing some limits on on-Reservation Tribal businesses reflect that Tribal business activities may not go forward in the totally unfettered mode set forth by Petitioner and its *amici*.

CONCLUSION

Yakama realizes that the factual arguments made by Petitioner and its *amici* are irrelevant to the decision of this case. However, those arguments, as presented by Petitioner and *amici* create a distinct impression that affirmance could lead to serious economic consequences for County government. As noted herein, those concerns are speculative and, at the very least, highly inflated.

In the one case on record regarding this specific issue – the remand in the *Yakima County* case – it is readily apparent that even with a large number of fee parcels involved, the tax consequences to the County do not rise even to the level of background noise. Petitioner and *amici* point to no specific instance of Tribal development of non-taxed fee land that has had any specific impact on County funding. Their allegations are highly speculative and are employed solely as a scare tactic. This Court should ignore their arguments and concentrate solely

upon the legal merits of this case in reaching an affirmance of the decision below.

Respectfully submitted,

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APPENDIX 1

[LOGO]

YAMIKA COUNTY TREASURER

128 N. 2nd St. Room 115 P.O. BOX 1408 YAKIMA, WA 98907-1408

NANCY E. DAVIDSON – COUNTY TREASURER
ILENE THOMSON – ASSISTANT TREASURER

MEMO

TO: Nancy Davidson, County Treasurer

FROM: David Bleckinger, Acct. Supervisor
Toni Bowron, Tax Division Supervisor

DATE: April 1, 1994

SUBJECT: Yakama Indian Nation Litigation

Below is breakdown of taxes, interest, penalty, administrative costs and assessments for those 577 parcels designated as belonging to Yakama Indian Nation members. We have calculated interest through April, 1994.

Taxes	$ 1,307,986.54
Interest	436,763.43
Penalty	97,086.17
Admin. Costs	38,662.63
Assessments	34,541.76
TOTAL	$ 1,915,040.53

The parcel paid on the attached receipt number 131631 was processed after the statements prepared for the court. This resulted in the dollar amount needing to be lowered by $5,747.33.